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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1962

No. 2201

LAWRENCE W. BAGGETT, ROCKY BAUER, Z. W. BIRNBAUM, JOOST E. BUSINGER, ISABEL S. CARO, GIOVANNI COSTIGAN, J. G. DASH, WILLIAM A. DAWSON, JAY PATRICK DONALEY, DAVID M. EAVES, JOHN M. EMLEN, T. SAUNDERS ENGLISH, VICTOR ERLICH, ROBERT G. FLEAGLE, RONALD GEBALLE, PATRICK T. GOLDSWORTHY, MILTON P. GORDON, ALVIN D. GREENBERG, ROBERT E. GREENGO, GORDON GRIFFITHS, W. MARY GRIFFITHS, ISAAC HALPERN, ARNOLD HANSON, W. STULL HOLT, ABRAHAM C. KELLER, ARTHUR L. KOBLER, SCOTT LYTLE, ROBERT W. MACDONALD, D. F. MAGEE, HENRY W. MAIER, WILLIAM H. MATCHETT, KARL P. MAUZEY, TREVOR J. MCMINN, IRVING MILOWE, ROBERTA MILOWE, WAYNE C. MULLER, RHOADS MURPHEY, DAVID S. NEWMAN, HOWARD NOSTRAND, GORDON H. ORIANS, SIMON OTTENBERG, JACK R. PARSONS, EUGENE C. PIZZUTO, MELVIN RADER, KENNETH EYRE READ, MAX SAVELLE, ANNICK SMITH, C. A. VALENTINE, LESLIE WARNER, JAMES B. WATSON, WALTER B. WATSON, PHILIP E. WILCOX, THEODORE W. WILCOX, WILLIAM B. WOOLF, PAUL DIETRICHSON, JON BRIDGMAN, BORIS A. JACOBSOHN, PATRICIA J. KELLER, LUCILLE L. CURTIS, ALBERT NUJENHUIS, RICHARD MORRILL, WILLIS KONICK, ROBERT G. CLARKE, THEODORE LANE,

Appellants,

v.

DOROTHY BULLITT, JOSEPH DRUMHELLER, JOHN L. KING, HERBERT S. LITTLE, ALBERT MURPHY, JOHN J. O'CONNELL, CHARLES E. ODEGAARD, HAROLD S. SHEFELMAN, ROBERT J. WILLIS,

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MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

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Pursuant to the provisions of Supreme Court Rule 16 (1), appellees respectfully move the above entitled court to dismiss this appeal, or in the alternative to affirm on the grounds that the appeal presents no substantial federal question.

The appellants shall be referred to in this brief as "the employees" and the appellees as "the regents."

The jurisdictional statement shall be referred to as "statement."

This Court should be advised that E. A. Addington appears as an appellee in the caption of the statement in place of Albert Murphy. Mr. Addington has, in fact, filled the vacancy on the Board of Regents caused by Albert Murphy's death. However, to our knowledge, no motion has been made changing the parties.

Part I

ADDITIONS AND CORRECTIONS TO EMPLOYEES' STATEMENT OF THE CASE

Employees' Statement of the Case (Statement, p. 11) contains so much material that is argumentative, omits so much and, in fact, contains so much erroneous information that Regents, at the outset, must correct it and add to it.

Because this litigation has a long history, is of a declaratory nature, and because the key statute

involved is amendatory in nature, we have included certain appendices. Appendix A sets out much of the legislation passed since World War II relating to subversive activities. Appendix B sets out the oath forms, or the statutes on which the oaths are based, involved in the leading cases to come before this Court.

LEGISLATIVE BACKGROUND

For these same reasons, it is necessary to consider chronologically the statutes and the litigation involving subversive activities since World War II. Chapter 377, Laws of 1955 cannot be viewed in a vacuum. It is amendatory and it is only one of a number of acts passed over a period of years since World War II. It is necessary to examine these other acts as well and to consider their legislative background. (See *Nostrand v. Balmer*, 53 Wn. (2d) 460, 335 P. (2d) 10, at p. 465 *et seq.*) (The statute requiring an oath of allegiance, chapter 103, Laws of 1931, will be considered in Part VII, *infra.*)

In 1947 the legislature passed the first of these measures. (Laws of 1947, chapter 287, section 2, p. 1334.) It was a proviso in the appropriation act forbidding public funds from reaching public employees who advocated, or who were members of organizations which advocated, the overthrow of the government of the United States by force or violence. During the same session, the legislature through House Concurrent Resolution No. 10 cre-

ated a joint fact-finding committee on un-American activities. (Laws of 1947, p. 1378, set out in Appendix A, *infra.*) A petitioner asked this court to review this resolution. *State ex rel. Robinson v. Fluent*, 30 Wn. (2d) 194, 191 P. (2d) 241, 335 U. S. 844 (Cert. den.). This committee held extensive hearings, involving a great many witnesses. Litigation resulted from these hearings. *State v. James*, 36 Wn. (2d) 882, 221 P. (2d) 482, 341 U. S. 911 (Cert. den.), 341 U. S. 937 (rehearing den.), *State v. Gundlach*, *State v. Forschmiedt*, *State v. Ottenheimer*, *State v. James*, 36 Wn. (2d) 918, 221 P. (2d) 502; 341 U. S. 910 (cert. den. in *Forschmiedt & James*); 341 U. S. 937 (rehearing den.).

The committee reported its extensive findings and recommendations to the 1949 session of the legislature. (House Journal 1949, p. 1095.) This was not included in the appendices because of its length. On page 1095, the committee incorporated by reference two lengthy printed reports containing a stenographic transcript of the hearings, the *First Report Un-American Activities in Washington State, 1948*, and *The Second Report, Un-American Activities in Washington State, 1948*. The *First Report* and *Second Report* are a part of the record in this case.

In 1949 the legislature enacted a proviso, as part of its appropriation act, similar to that adopted by the legislature in 1947. This is set forth in Appendix A, *infra*. During that session four separate

bills were introduced to continue this committee (House Bill No. 264, Senate Bills 361, 378 and 356, this last by title only). Not one became law.

In 1951 the Governor in his message to the legislature urged the legislature to "give thought to enactment of appropriate provisions for the curbing of subversive activity, and to protect our free institutions from perversion into weapons of aggression against us in the hand of our enemies." He further pointed out that,

> "By Concurrent Resolution No. 10, the Thirtieth Legislature created the Joint Legislative Fact Finding Committee on Un-American Activities. Through the labors of this committee much was learned of the degree to which disloyal groups had infiltrated into organizations of our senior citizens, into various economic and educational groups. As the result of these disclosures, some remedial action was taken but in the light of the grave emergency which we now face, additional action must be taken immediately. Therefore a bill is being prepared calculated to give support at the state level to the efforts of our various federal agencies charged with the responsibility of combatting these forces of tyranny and enslavement. * * *" (*House Journal 1951*, beginning at p. 23).

A bill was introduced by executive request which later became chapter 254, Laws of 1951. This act is very similar to Maryland's Ober Act. (Chapter 86, Laws of Md. 1949, Anno. Code of Md., Article 85A.) It is set out in full in Appendix A, *infra*. Five of the original twenty-two sections, namely, sections

6, 7, 8, 10 and 21 were vetoed. The Court will note that it is a broad act relating to many matters in addition to public employees. Section 16 of this act, which requires an oath as a condition precedent to filing a declaration of candidacy for public office, was unsuccessfully challenged in *Huntamer v. Coe*, 40 Wn. (2d) 767, 246 P. (2d) 489.

In 1953, after this Court's decision in *Wieman v. Updegraff*, 344 U. S. 183, the legislature passed chapter 142, Laws of 1953, amending the definition of "subversive person," to make the element of scienter more clear. This is set out in full in Appendix A, *infra*.

In 1955, the Governor, in his message to the legislature, pointed out that "* * * the menace of communism looms as an ever greater threat to the future of the free world than the 'isms' of the past. The United States is giving, and must continue to give, leadership to the non-communist world. To do so, with ever increasing confidence and vigor, our nation must lead from strength, the strength from within that comes from a free people, spiritually strong and functioning through the soundest set of governmental institutions yet developed by man. * * *" (*Senate Journal*, 1955, p. 34.) During this session chapter 377, Laws of 1955, one of the acts in question, was passed. (See Statement, Appendix B, p. 37.)

In the years since World War II, the legislature, responding to world conditions, has passed several

measures relating to subversive activities. The approach has been pragmatic. It began with a proviso in the budget, followed by a fact-finding committee which was discontinued two years later. After the Korean conflict began a comprehensive act was passed, which in turn has been twice amended. The pattern was formed over many years based upon experience. No such legislation has been passed in the last eight years. It is not "scare legislation" passed in a moment of hysteria. There is no permanent fact-finding committee. (There has been no such committee for almost a decade and a half.) It is not perfect. It is controversial. Many doubt its wisdom. But we shall endeavor to show that it violates no constitutional provision and that the route is open to legislative action. The wisdom of the statute is, of course, a matter for the legislature, not the courts. See *Daniel v. Family Security Life Ins. Co.*, 336 U. S. 220, at p. 224.

THE OATH

The 1955 statute does not prescribe any particular oath forms. The state attorney general has provided a suggested form to the state printer. This suggested oath form has been revised at least twice by the state attorney general. The state printer in turn supplies the oath forms to various agencies. Some large agencies print their own oath forms, other agencies combine the oath form with an application form. Oaths are kept on file with the em-

ploying agency. We are unaware of any discharge based on refusal to sign the oath.

The suggested oath is usually called a "loyalty oath." It is unfortunate that this term with its many-layered connotations should denote this oath. While we have used this terminology on occasion ourselves because of its widespread currency, this should not obscure the fact that the oath is not a loyalty oath at all but is in fact a negative disclaimer oath. (It is suggested that this court examine oath form B (Statement, Appendix, p. 40) rather than oath form A which is confusing in that it also contains the oath required by the 1931 act.)

A person taking the oath swears to two facts: that he is not a subversive person as defined in the Act, and that he is not a member of the Communist Party or knowingly of any other subversive organization. Only the second fact is required by the 1955 Act. The former stems from sections 11 and 12 of the 1951 Act.

Employees blur this distinction and lump the entire oath into the 1955 Act. Thus on p. 23 of their statement, they state that "Oath form B * * * carries an oath designed solely to satisfy the requirements of the 1955 statute." (Emphasis supplied.)

Section 13 of the 1951 Act concerns non-sensitive positions. No claim is made by employees that the positions involved in this case are, or should be, non-sensitive.

The oath requirement contemplated by section 1 of the 1955 Act looks to the present. Thus, it is possible for a communist to resign from the Communist Party today and take the oath tomorrow. Unlike other oath requirements before this court (See Appendix B where several of these oath forms have been set out), past membership is not involved.

The oath so clearly satisfies the scienter requirement as a result of statutory amendment (chapter 142, Laws of 1953), judicial interpretation (*Nostrand v. Balmer, supra*, at p. 460, 470, 476 and 484) which this court must "accept without question" *Cramp v. Florida*, 368 U. S. 278, and the form of the oath itself, that Employees have made no claim that scienter is lacking. *Wieman v. Updegraff*, 344 U. S. 183 is, as a result, not applicable.

The oath requirement is pinpointed to a particular group: Officials and employees of state and local government. No attempt was made to cover a person without regard to his employment as in *Speiser v. Randall*, 357 U. S. 513.

Prior Litigation

The 1955 Act was unsuccessfully attacked in 1955 by two University of Washington professors. They prevailed in the State Superior Court, but the federal constitutional questions which they raised in that case were decided adversely to them by the Washington State Supreme Court. *Nostrand v. Balmer*, 53 Wn. (2d) 460, 335 P. (2d) 10. The plaintiffs there, who were professors with tenure at the

university, appealed to this Court. This Court vacated the decision of the State Supreme Court and remanded the case for consideration of the question of whether state employees required to sign such an oath are entitled to a hearing at which refusal to take the oath could be explained or defended. *Nostrand v. Little*, 362 U. S. 474. Pursuant to this remand, the Washington Supreme Court answered the question in the affirmative. *Nostrand v. Little*, 58 Wn. (2d) 111, 361 P. (2d) 551. As to all other issues involved in the case, the State Supreme Court adhered to the views expressed in its earlier opinion.

An appeal was again taken to this Court. On January 22, 1962, this Court granted the State Attorney General's motion to dismiss. This Court dismissed the appeal "for want of a substantial federal question." *Nostrand v. Little*, 368 U. S. 436.

The great bulk of the Employees' "substantial" questions relating to the 1955 Act is thus being served up to this Court for the third time. Included in this group are the First and Fifth Amendment arguments. All of this litigation has been declaratory in nature. No one, to our knowledge, has refused to sign in the sense that discharge proceedings could be started against the one refusing. No one, to our knowledge, has been discharged for not signing. Seldom has there been so much litigation over so few concrete facts.

THE REFUSAL TO SIGN

Stripped of biographical data, statements of intention, background on the University of Washington, and other matter of less relevance, the operative facts are few in number. The University has proffered the oaths and gave the recipients until October 1, 1962 to sign them. Prior to October 1, 1962 the lower court enjoined the University from demanding the completion of the oaths, this injunction being presently in force. Hence, as the lower court noted, "Enforcement of the statutes by University officials, while clearly intended, is still prospective as a result of this litigation." (Statement, p. 9, Appendix.) Thus, there is nothing preventing all of the Employees from changing their mind today and deciding to take the oath, despite their vehement statements of intention. (See P.T.O. p. 99.) Thus, the word "refusal" when it occurs in the pre-trial order and in the lower court opinion must be seen in the light of a threat, avowal, or statement of intention, subject to change at any moment, not as an actual irrevocable refusal. This being true, the "refusal" of the Employees is not an operative fact except, perhaps, in a Pickwickian sense. In other words, the demand for information is a certainty (and the First Amendment argument should be seen in this light) and the continued refusal and possible discharge with or without a hearing is only a possibility (and the Fourteenth Amendment argument should be seen in this light). The question of whether there is an actual controversy is considered in Part VIII, *infra*.

Part II

THE 1951 ACT, AND THE PORTION OF THE OATH BASED THEREON, ARE NOT PROPERLY BEFORE THIS COURT

We assume that only the 1931 Act and the 1955 Amendatory Act are being challenged. There is some confusion in Employees' Statement, in this regard. On page 79 they may be referring to the 1951 Act. On page 11 they refer to "several statutes" but on page 4 and page 81 they refer unequivocally to the 1931 Act and the 1955 Act. This confusion sometimes takes the form of an erroneous statement as on p. 13 where we learn that the 1955 Act "sets forth a requirement in addition to those imposed by the 1951 Subversive Activities Act: that the official heads of each state agency * * * shall require that each and every employee, or applicant for employment shall state under oath whether or not he or she knowingly * * * is a subversive person * * *:" In fact, this provision existed for years prior to the passage of the 1955 Act in the form of Section 12 of the 1951 Act. On page 15 we learn that RCW 9.81.083 is part of the 1951 Act while in fact it is part of the 1955 Act. On page 88 reference is made to 9.91.060 which relates to leaving children unattended in a parked automobile.

While the last few errors are admittedly technical in nature, much of the confusion as to the

statutes involved, being endemic in the Statement, is not so simply segregated.

Another aspect of this confusion is presented by the Employees' treatment of criminal sanctions.

One is protected against the imposition of a criminal sanction by a panoply of constitutional guarantees which are not applicable to the imposition of a civil disability such as loss of public employment. This is true even though the latter may, on occasion, be more drastic than the former.

Quite apart from the crime of perjury, the 1951 statute contains certain criminal provisions based on knowing membership in a subversive organization which, to be candid, would pose constitutional questions if they were before this Court, in view of *Noto v. U. S.*, 367 U. S. 290 and *Scales v. U. S.*, 367 U. S. 203. Employees have made frequent reference to them as if they had somehow attainted the statutory provisions in question. (See Statement, pp. 13, 16, and p. 54 where Employees cite the criminal cases of *Scales*, *Noto*, both *supra*, *Yates v. U. S.*, 354 U. S. 298, and *Dennis v. U. S.*, 341 U. S. 494, as authority for the proposition that a civil disability may not be imposed. See also pp. 47-49 where the criminal sanction is blended with the civil sanction. The question is not whether a state has "any power to prevent" something. The question is whether a civil disability can be imposed in certain situations.

In addition to creating confusion, Employees' failure to challenge the 1951 Act directly creates

two serious questions. First, can this Court on this record invalidate the 1951 Act? Second, assuming that the Court cannot, how would invalidation of the 1955 Act affect the 1951 Act?

We submit that the Court cannot invalidate the 1951 Act. Employees have challenged an administrative measure, namely, the oath as formulated, without challenging the statute upon which the administrative action is based. While this type of challenge is common enough where the administrator has exceeded the bounds of his authority, and is not acting within the scope of his statutory authority, it is surely a rarity where, as here, no claim is made that the action of the administrator is without statutory foundation. To the contrary, they have, by way of argument, attempted to challenge the definitional provisions of the 1951 Act (Statement, p. 100.) It would be a bizarre decision which struck down an administrative measure clearly based upon an unchallenged statute; it would be an even more bizarre decision which invalidated a statute not before the court on the basis of an administrative act. A portion of the oath is so directly bound to the 1951 Act, as pointed out earlier, that to challenge this portion of the oath, the Employees must challenge the 1951 Act. This they have not done. This they cannot do for two reasons.

In the first place, Employees did not challenge the 1951 Act in the lower court and may not do so for the first time on appeal. *Shelley v. Kraemer*, 334

U. S. 1. In addition, Employees have not directly challenged the 1951 Act in their appeal to this Court. The question is thus not raised. *U. S. v. Spector*, 343 U. S. 169. The question, at best, lurks in the record, and this is not sufficient. *McNeal v. Culver*, 365 U. S. 190. This Court is rightly reluctant to pass upon constitutional issues which are not squarely presented by the record. *Arkansas Fuel Oil Co. v. La. ex rel. Muslow*, 304 U. S. 197.

The other question to be considered is, how would invalidation of the 1955 Act affect the 1951 Act?

The general rule, supported by Washington cases is: if the amendatory act is wholly invalid, the statute sought to be amended is held to remain in full force and effect. 1 Sutherland, Statutory Construction, 442, § 1937, 3rd ed. 1943. See *North Bend Stage Line v. Dept. Public Works*, 170 Wash. 217, 16 P. (2d) 206, where the state high court said at page 220:

> " * * * These sections, as unamended, provide for review of orders of the department in the superior court substantially as, by these amendments, they provide for such review in this court. * * * "

And at page 228 after holding the grant of direct appeal from the department to the state supreme court unconstitutional, the court said that the amended statutes " * * * remain unsuperseded and unrepealed by chapter 119, Laws of 1931, p. 363

* * * " citing *Corwin Investment Co. v. White*, 166 Wash. 195, 6 P. (2d) 607.

Indeed, in the previous oath case of *Nostrand v. Balmer, supra*, the Employees admitted as much when on page 85 of their brief to the state high court they unequivocally stated that, "To declare the entire 1955 Act unconstitutional is to leave the 1951 Act totally effective and to eliminate the problems of interpretation."

Viewed in this light, the Employees' references to the 1951 Act and to the portion of the oath derived from the 1951 Act seem indeed wide of the mark.

Part III

THE 1955 ACT DOES NOT VIOLATE THE FIRST AMENDMENT

THE CASE LAW IS OVERWHELMING TO THE EFFECT THAT THE DISCLAIMER PROVISION OF THE 1955 ACT DOES NOT VIOLATE THE FIRST AMENDMENT

This Court has decided no one case involving every issue and every fact presented here but the case law supporting Regents' position is so strong that they almost have an *embarras des richesses*. The strength of precedent favoring the Regents is even apparent from the Employees' Statement in that they must make fine distinctions, distinctions without meaning, or ask the Court to disregard precedent.

This lack of case authority does not mean that the appeal is frivolous. It does mean, as we will endeavor to show, that the Court must overrule, or

worse, ignore several cases to hold for the Employees on the merits. It does mean, also, that the questions presented are not substantial.

Thus, Employees write off *Konigsberg v. California*, 353 U. S. 252, and 366 U. S. 36, *In re Anastaplo*, 366 U. S. 82, and *Adler v. Bd. of Ed.*, 342 U. S. 485, as having been decided on the basis of "privilege." (Statement, p. 41.) It is true that, taken alone, certain language on p. 492 of *Adler* and p. 90 of *Anastaplo* seems to speak in terms of "right-privilege," but the cases certainly are not decided on this basis. This Court did not decide that a state could deny the right to practice law to members of a particular race or religion on the theory that state employment is a "privilege" which could be limited in any way, however arbitrary.

Nor can Employees successfully show that *N.A.A.C.P. v. Alabama*, 357 U. S. 449, or *Bates v. Little Rock*, 361 U. S. 516, corrodes *Adler v. Bd. of Ed.*, 342 U. S. 485; for underlying the *N.A.A.C.P.* decision, where this Court held that a state may not compel the disclosure of N.A.A.C.P. membership lists, is the premise that the *nature* of the organization is decisive. The Court was careful to distinguish *Bryant v. Zimmerman*, 278 U. S. 63, upholding a New York statute requiring disclosure of Ku Klux Klan membership.

Gerende v. Bd. of Supervisors, 341 U. S. 56, involving, as it does, the summary imposition of a civil disability upon a refusal to take an oath is

such strong authority against Employees' position that they are driven to relying upon the differences in the wording of the oaths. (Statement, p. 39) Parenthetically, on the same page, Employees erroneously state that the language defining subversive person in the Ober Act is identical to that in this case.

Beilan v. Bd. of Education, 357 U. S. 399, is certainly authority against Employees' position on the First Amendment argument, although it is not applicable to the procedural due process argument. (Statement, p. 39)

Most startling of all is Employees' attempt to distinguish *Garner v. Bd. of Public Works*, 341 U. S. 716. On page 38 Employees claim "* * * this Court did not explore and adjudicate the First Amendment question presented by this case." The fact is that the petitioners in *Garner* argued the First Amendment points extensively. But this Court, before coming to grips with the bill of attainder point, concluded on page 721 that, "This Court has held that Congress may reasonably restrict the political activity of federal civil service employees for such a purpose; *United Public Workers v. Mitchell*, 330 U. S. 75, and a State is not without power to do as much." Of course, *Mitchell* revolved largely around a First Amendment argument and the court discussed it extensively beginning on p. 95. It was not necessary for the court to repeat this entire discussion in *Garner*.

Hence, Employees' attempts to distinguish the foregoing cases are, we submit, unsuccessful.

May the state make the inquiry required by the 1955 Act without violating the public employee's First Amendment rights? The answer must be in the affirmative. *Adler v. Board of Education*, 342 U. S. 485, *Beilan v. Board of Education*, 357 U. S. 399. Nor does *Shelton v. Tucker*, 364 U. S. 479 cast a shadow on these cases; for, in that case, on page 485, footnote 4, this Court said, "The actual holdings in *Adler* and *Beilan*, involving the validity of teachers' discharges, are not relevant to the present case." (See our discussion of thise case and *Sweezy v. New Hampshire*, in Part IV, *infra.*)

The Employees' only hope is for a reversal of these cases. But the trend is against them. *Barenblatt v. U. S.*, 360 U. S. 109, 125-134; *Wilkinson v. U. S.* 365 U. S. 399; *Braden v. U. S.*, 365 U. S. 431; *Communist Party v. S.A.C.B.*, 367 U. S. 1, 96-103. The lower court was correct in pointing out that, "It cannot be questioned that a state has power to safeguard the public service from disloyalty; and the right of the state to inquire of its employees concerning their loyalty has been recognized in a number of cases." (Statement, page 10, Appendix.)

Regarding the form of the inquiry, the lower court held (Statement, page 13, Appendix), that there is no violation of First Amendment rights simply because a written form is used rather than an oral form, such as was used in *Beilan*. The key

question is whether the written form to be signed is limited to the area of legitimate state concern. The lower court added, "In an institution as large as the University of Washington, to conduct personal interviews of all present and prospective employees concerning their loyalty would be administratively burdensome and might be subject to abuses. In lieu of such inquiry the university officials have elected to require a sworn statement, narrowly limited to the precise matters of legitimate state concern. So limited, the oath serves the same purpose as individual inquiry." (Statement, pp. 13-14, Appendix.)

The First Amendment argument of whether the inquiry can be made should be treated separately from the Fifth Amendment argument of whether dismissal can be carried out on the basis of the answer or lack of answer given.

THE 1955 ACT IS NOT AN UNCONSTITUTIONAL PRIOR RESTRAINT

Citing *Shelton v. Tucker*, 364 U. S. 479 as authority, Employees claim that the 1955 Act is void as an unconstitutional prior restraint on the grounds that the legitimate state interest could be more narrowly achieved by less drastic means. It is not clear whether Employees are relying on *Speiser v. Randall*, 357 U. S. 513, as well, when they cite it in their Statement on page 77. If so, this reliance is misplaced for on page 517, footnote 3, this Court stated:

> "Appellants also argue that these provisions are invalid * * * as invading liberty of speech * * * Our disposition of the cases makes consideration of these questions unnecessary."

A prior restraint is not, *ipso facto*, unconstitutional. *Times Film Corp. v. Chicago*, 365 U. S. 43. But it is true that this Court will not allow a state to abridge certain liberties where no substantial state interest is involved, and where the attempted abridgement is done in the guise of combating subversion. Thus a declaration that an Arkansas statute is justified because of the right of a state to investigate the competence and fitness of those whom it hires to teach in its schools cannot be used as a cloak to cover the attempt of a state to discover whether a teacher is a member of the N.A.A.C.P. *Shelton v. Tucker*, 364 U. S. 479. Nor can one making inquiry pursuant to the investigative powers of a legislature, and again in the guise of combating subversion, force an answer as to belief, abstract advocacy of Marxism, and the like. *Sweezy v. New Hampshire*, 354 U. S. 234.

Certainly *Shelton* is not authority for the proposition that every statute and oath are invalid where it is possible in any regard to narrow the scope of the statute or the oath without impairing its effectiveness. To go to such extremes would be to place an impossible burden on the legislative bodies. Not one of the oaths upheld by this Court would be valid if this were the test, since a few

moments reflection suggests changes which would bring them into sharper focus.

The oath and the statute involved in this case are a far cry from the statute involved in *Shelton*.

THE INTEREST TO BE PROTECTED IS SUBSTANTIAL

Perhaps the most crucial part of Employees' First Amendment argument concerns the lack of a societal interest to justify the 1955 Act. The Employees must show that the societal interest is not substantial, as in *West Virginia State Board of Education v. Barnette*, 319 U. S. 624. Employees must somehow get around the two reports of the Joint Fact-Finding Committee on Un-American Activities. (The Joint Fact-Finding Committee on Un-American Activities was omitted from Employees' index, but is discussed in their statement beginning on p. 65.) This they have attempted to do by claiming that parts of the report are false (Statement, p. 64) and by claiming that the lapse of six years from the report's filing to the 1955 Act is too long for the findings to support the 1955 Act (Statement, p. 66).

The *Second Report Un-American Activities in Washington, 1948*, deals, in the main, with the University of Washington. It would serve no purpose to belabor this point. It is a part of the record and the Court may there examine not only the testimony of the six faculty members who were discharged or placed on probation, but also the

testimony of the former veterans counselor (*Second Report*, p. 304), the couple who ran a legitimate theater near the University (*Second Report*, pp. 265, 267), and the attorney who described how his son was influenced by faculty members (*Second Report*, p. 298).

There is no blanket requirement that every piece of legislation dealing with subversion be preceded by legislative findings, but it cannot be doubted that valid findings strengthen the legislation when its constitutionality is called into question. After reciting certain legislative findings on the nature of the communist movement too lengthy to be reported here, this Court in *Communist Party v. S.A.C.B.*, 367 U. S. 1, 94, said:

> "It is not for the courts to re-examine the validity of these legislative findings, and reject them. See *Harisiades v. Shaughnessy*, 342 US 580. They are the product of extensive investigation by committees of Congress over more than a decade and a half. Cf. *Nebbia v. New York*, 291 US 502. We certainly cannot dismiss them as unfounded or irrational imaginings. See *Galvan v. Press*, 347 US 522; *American Communications Asso. v. Douds*, 339 US 382. * * *"

Nor will this Court give less weight to findings of a state legislature which come to the Court "encased in the armor wrought by prior legislative deliberation." *Bridges v. Calif.*, 314 U. S. 252, 261.

Conceding, arguendo, that conditions could change to such a degree as to vitiate a legislative

finding, we need not belabor the point that the dangers resulting from the communist movement referred to in the Joint Committee's report (House Journal 1949, p. 1095 *et seq.*) have not disappeared. This court has, in effect, recognized this fact by deciding the *Communist Party* case, *supra*, on June 5, 1961, although it was based on legislation dating from 1950 and 1954. Subversive activities legislation was passed in 1947, 1949, 1951, 1953 and 1955. Argument that any of this legislation is invalid because additional legislative findings were not made after 1949 seems strained, to say the least.

Employees claim, "* * * as the District Court failed to note, the 1949 session of the legislature enacted no 'anti-subversive' legislation." "It was not until 1951 * * * that such legislation was enacted." (Statement, p. 66) This is erroneous in view of section 2, chapter 242, Laws of 1949, set out in Appendix A, *infra*.

But Employees have even more difficulty attacking the validity of the legislative findings.

They claim, "At the time when that [1949] legislative session was beginning, the University of Washington was concluding its separate and immediate action to rid itself of employees, faculty and otherwise, who might have been subversive * * *" (Statement, p. 65). In fact, this action came only after the public disclosures of the Joint Fact-Finding Committee, which held hearings during 1948. Employees show no action on this score

in the years preceding 1948, nor do they show that any action would ever have been taken in the absence of the legislative prod.

A more surprising statement is found later on the same page: "During the hearings of the legislative committee, only ten members of the University of Washington faculty of 700 full-time members, were named, but not proved, as being or having been, members of the communist party." In view of the admissions of faculty witnesses on past membership (*Second Report*, 305, 199, 18, 131, 104, 243), the statement is plainly erroneous, if the word "proof" is still to have any meaning.

Employees apparently feel that six faculty members dismissed, or placed on probation, is a modest number. That the committee felt the number significant is apparent from the foreword to the *Second Report*.

From this sort of argument, Employees conclude that it is "extremely doubtful" whether the legislature in 1949 could "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest." (Statement, p. 66.)

The Reports of the Joint Fact-Finding Committee reinforce what this court should decide in any event: There is an interest of the state in self-preservation which justifies the action of the legislature.

Employees knock down the same straw man they knocked down in their trial court brief when they say, "It is no answer to argue that state employment is a 'privilege' and not a 'right' and then infer that the infringements here are permissible because they infringe upon no rights." (Statement, p. 54.)

Regents gave no such answer in trial court and give no such answer here. (See the trial court's memorandum opinion, p. 24, Appendix, Statement.) Certainly, the wealth of material showing a substantial interest to be protected makes any such argument unnecessary.

Part IV

THE 1955 ACT DOES NOT VIOLATE THE FOURTEENTH AMENDMENT

THE EMPLOYEES ARE PROBABLY ENTITLED TO A HEARING

After *Nostrand v. Little, supra*, was remanded by this Court to the Washington high court for determination of whether the professors in this case would be accorded a hearing, counsel for the professors argued that under law no hearing could be accorded to the professors. The state attorney argued to the contrary. In its decision the court held:

> "We are of the opinion that the provision in the subversive activities act to the effect that refusal to take the oath 'on any grounds' shall be cause for 'immediate termination of employment,' should not be interpreted in the case before us as meaning that a full professor hav-

> ing tenure rights under his contract of employment is deprived of the right to a hearing as provided in the rules and regulations of the university. In other words, if the professors should refuse to sign the affidavit (which they have not yet refused to do), they, in our opinion, will be entitled to the hearing before the tenure committee and to the other procedures relating to termination of employment prescribed in the university's rules and regulations, set forth in the appendix to this opinion." 58 Wn. (2d) at p. 131.

The matter of whether a person without tenure would be accorded a hearing was not before the court.

Three factors make it likely that, under Washington law, the Employees involved in this case would be accorded a hearing should they refuse to sign and request a hearing. These three factors are: the court's decision on remand in *Nostrand v. Little, supra*; the existence of two important pieces of legislation, the Administrative Procedures Act (chapter 234, Laws of 1959) and the State Civil Service Act (chapter 1, Laws of 1961); and the administrative practices followed by state agencies of allowing a hearing, even though a hearing is not specifically provided by statute.

With regard to the first of these factors, the real thrust of *Nostrand v. Little, supra*, is the fact that the court there held that a professor with tenure could not be discharged under the 1955 Act alone and without reference to any other statutes. If the court construed the 1955 Act with RCW 28.77.120

and 28.77.130 there is every likelihood that it would consider other statutes if the last quoted statutes were not applicable, as would be the case of a person without tenure.

With regard to the second factor, the Court should be mindful of the fact that there is a series of "filters" designed to guarantee due process of law by allowing a hearing. The first of these filters is the tenure code. This would afford many of the Employees involved in this appeal a hearing.

The second filter is the Civil Service Act. It is true that according to section 7 of the Act the provisions do not apply to academic personnel of the institutions of higher learning as well as to certain other employees. Thus, we cannot say for a certainty that it would not apply to certain non-academic personnel such as Annick Smith who is an assistant editor of the University of Washington Press. The Act has never been construed in this regard.

The third filter would seem to be fine enough to catch all of the Employees not given the right to a hearing by some other statute. This is the State Administrative Procedures Act. The Washington Administrative Procedures Act in section 9 provides in part as follows: "In any contested case all parties shall be afforded an opportunity for hearing after reasonable notice. * * *" Section 1 defines a contested case as "* * * a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or *constitu-*

tional right to be determined after an agency hearing." (Emphasis supplied.)

Gnecci v. State of Washington, 58 Wn. (2d) 467, 364 P. (2d) 225, a case decided *en banc* a few months after *Nostrand v. Little, supra*, indicates that under the State Administrative Procedures Act, such an employee would be provided a hearing if the lack of a hearing would deprive him of a constitutional right. The court seemed to be following the lead of this Court. (*See Wong Yang Sung v. McGrath*, 339 U. S. 33.) Moreover, this Court will assume that a statute will be interpreted by the highest state court in such a way as to avoid raising constitutional problems where such interpretation is possible. *Fox v. Washington*, 236 U.S. 273.

It is true that the Employees argue on pages 90 and 91 of their Statement that under *Nostrand v. Little, supra*, neither the Civil Service Act nor the the Administrative Procedures Act could be used to accord the employees in this case a hearing but, in fact, the question of whether nontenured personnel could utilize either of these acts was not before the court. On page 121 of *Nostrand v. Little, supra*, our high court tried to preclude such claims by saying, "We, of course, limit our consideration of the problem to the facts before us."

In regard to the third factor, state agencies have, upon the advice of the state attorney general, on numerous occasions accorded a hearing to a party on the basis of the Administrative Procedures Act

where no specific hearing is provided by statute. An example of this is *In re Christensen*, No. 34575 Thurston County Superior Court, State of Washington. In this case the director of licenses granted a hearing to an applicant who had been refused a broker's license even though such a hearing was not specifically provided by the Real Estate Licensing Act (chapter 18.85 RCW). If an individual attempted to resign from a subversive organization by communicating with one of the members, it is possible this individual would not be sure whether his resignation was effective, many of such organizations not having membership cards. If such an individual were to ask for a hearing so that he might explain the steps he had taken to attempt to resign it seems most probable that the hearing would be allowed under Washington law and administrative practice.

With regard to the hearing issue our burden is light. We need not show for a certainty that a hearing would be granted. We need only show that under the statutes there is a possibility. "Wise judicial administration counsels that decision of the federal question be deferred until the potentially controlling state law issue is authoritatively put to rest." *United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U. S. 134, 136.

Since a hearing is probably accorded under Washington law, it is probably not necessary for us to rely upon cases upholding the imposition of a civil

disability with no right to a hearing, such as *Board of Governors of Federal Reserve System v. Agnew*, 329 U. S. 441, *Gerende v. Board of Supervisor of Elections*, 341 U. S. 56, *United Public Workers v. Mitchell*, 330 U. S. 75, and *American Communications Association v. Douds*, 339 U. S. 382. This last case, in which this court upheld the validity of the non-communist disclaimer of the Taft-Hartley Act (61 Stat. 136, chapter 120) is so plainly against the Employees that they have made little attempt to distinguish it.

The difficulties which the Employees have encountered in arguing that no hearing will be accorded them are evidenced by their argument. Thus, on page 83 of their Statement the Employees quote a portion of the District Court's opinion out of context and give the word "substantial" quite a different meaning. Certainly the District Court was not passing upon what would be a substantial question for the purposes of this appeal; rather from the context of the entire opinion it is apparent that the District Court was pointing out that an oath requirement which would not allow for a hearing is of questionable constitutionality.

The difficulty is further manifested by the manner in which the Employees have emphasized certain portions of the Regents' statement. A reading of the document simply indicates that the Regents intend to follow the law, it does not indicate that under the law no hearing would be accorded an employee. Like-

wise on page 87, the Employees have italicized the words "on any grounds" found in the 1955 Act. The effect would have been very different if they had italicized the following three words, to wit, "*shall be cause* for immediate termination * * *" (Emphasis supplied.) There is, of course, a great difference between a matter being a cause for immediate termination and a matter which must result absolutely in immediate termination. Finally, the difficulty Employees encounter has forced them to claim that our state high court has gone so far as to allow only a sham hearing. (Statement, pp. 86, 89.) This our court would not do and has not done.

THE 1955 ACT IS NOT UNCONSTITUTIONALLY VAGUE

In dealing with this question (Statement, starting on page 100), Employees' difficulty comes not from stating the general rules but from attempting to apply the general rules to this particular case.

The oath required, and the statutes on which it is based, are not unconstitutionally vague; the terms used therein are susceptible of objective measurement. (We discussed the matter of which statute is before the court in Part II and that discussion will not be repeated here.)

Employees have quoted no cases which militate against the validity of this oath. Surely the reference to *Cramp v. Florida*, 368 U. S. 278 on page 101 of the Statement was only to set forth the general rule; for the oath involved in *Cramp* can hardly be compared with the oath in the present case. It provides

in part, "* * * that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party * * *" (This is set forth more fully in Appendix B). The Court, itself, seems to have distinguished this case from *Cramp* when, on page 286 it pointed out that:

> "The provision of the oath here in question, it is to be noted, says nothing of advocacy of violent overthrow of state or Federal Government. It says nothing of membership or affiliation with the Communist Party, past or present. The provision is completely lacking in these or any other terms *susceptible of objective measurement.*" (Emphasis supplied.)

This Court denied certiorari in a case involving alleged vagueness of the Ober Act which, as pointed out earlier, is very similar to the 1951 Act. *Shub v. Simpson*, 196 Md. 177, 76 A. (2d) 322, 340 U. S. 861. Also significant, is the fact that this Court affirmed *Gerende v. Bd. of Supervisors*, 341 U. S. 56, a decision based upon the interpretation of the *Shub* interpretation. But even more significant is the fact that this Court has affirmed prison sentences—a far cry from this declaratory judgment procedure—stemming from statutes which make these upon which this oath is based seem clear by comparison. While to set forth these statutes would make this motion unduly prolix, the Court is referred to the statutes involved in *Dennis v. U. S.*, 341 U. S. 494; *Gitlow v. N. Y.*, 268 U. S. 652, and *Whitney v. Calif.*, 274 U. S. 357. Added to this is the fact that this Court refused to strike down oaths, and the statutes

upon which they are based, which are much more questionable than those in this case. (See the oath forms of *Garner v. Bd. of Public Works*, 341 U. S. 716 and *American Communications Association v. Douds*, 339 U. S. 382, set forth in Appendix B.)

It is not necessary to set forth the lower court's discussion relating to vagueness. (See, Statement, Appendix beginning at page 16.) The fact that a unanimous three-judge court found that the meaning was not "uncertain or vague—in any event not to the extent that the statute must be held unconstitutional * * *" is itself persuasive that the statutes are not void on their face. On page 17 the lower court pointed out that a person taking the oath, "* * * * is not required to speculate concerning the applicability of every conceivable or rare meaning of the words employed." He need only apply them to his own case.

Although the subject of subversion is susceptible to overdramatization, it should be pointed out that based upon the history of other nations, a statute would be of little use which included within its ambit only those who participate in the *putsch* itself. It must also include those who provide assistance by supplying weapons and the like. Second, an insurrection is not the work of one man and, as a result a statute, to be of any use, cannot include only those who *alone* carried out the attempted *coup d'etat*.

In their Statement, Employees did not attack the word "revolution," found in the 1951 statute as

being ambiguous by claiming that "revolution" could involve a peaceful and constitutional change. Perhaps it is because even if this word were found unconstitutional, only the word would be stricken under our state high court's ruling in *Household Finance Corp. v. State*, 40 Wn. (2d) 451, 244 P. (2d) 260. The companion words "force or violence" would remain.

Once it is determined that the statutes are not void on their face, *Fox v. Washington*, 236 U. S. 273, is applicable, holding that the Court will assume that a statute will be interpreted by the highest state court in such a way as to avoid raising difficult constitutional problems where any such interpretation is possible. See also *Shuttlesworth v. Birmingham Bd. of Ed.*, 358 U. S. 101. Our state high court would of course, be guided by Section 19 of the 1951 Act which provides in part that, "Nothing in this act shall be construed * * * to limit or infringe upon freedom of the press or freedom of speech or assembly, within the meaning and the manner as guaranteed by the Constitution of the United States * * *"

THE 1955 ACT DOES NOT INVOLVE AN UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF

Citing *Speiser v. Randall*, 357 U. S. 513, as authority, Employees claim that the 1955 Act involves a denial of procedural due process in that it shifts the burden of proof to the public employee. While the Employees' argument might have merit were the oath demanded of the public in general, it has no

merit whereas here the oath requirement is directed to a specific group, to wit, public employees. A much more substantial societal interest exists where a state inquires into the loyalty and fitness of its public employees than where a state inquires into the loyalty and fitness of the public veterans, or members of a particular race or religion.

The petitioner in *Speiser* prevailed in this Court because of an unconstitutional allocation of the burden of proof in a tax exemption proceeding. This Court went to great lengths to distinguish certain disclaimer oath cases involving a specified group where the oath requirement is backed up by a substantial state interest. Specifically, this Court on page 527, with reference to *Garner v. Bd. of Pub. Wks.*, 341 U. S. 716, *Gerende v. Board of Supervisors*, 341 U. S. 56, and *American Communications Association v. Douds*, 339 U. S. 382, said, "In these cases, however, there was no attempt directly to control speech but rather to protect, from an evil shown to be grave, some interest clearly within the sphere of governmental concern." On page 528 the Court said, "The State argues that veterans as a class occupy a position of special trust and influence in the community, and therefore any veteran who engages in the proscribed advocacy constitutes a special danger to the State. But while a union official or public employee may be deprived of his position and thereby removed from the place of special danger, the State is powerless to erase the service which the veteran has rendered his country; though he be denied a tax

exemption, he remains a veteran. The State, consequently, can act against the veteran only as it can act against any other citizen, by imposing penalties to deter unlawful conduct." The *Speiser* case, then, cannot be used as authority to support the claim that the 1955 Act involves a deprivation without procedural due process.

Part V

OTHER CONTENTIONS OF EMPLOYEES CONSIDERED

THE 1955 OATH REQUIREMENT DOES NOT CONSTITUTE A BILL OF ATTAINDER

Employees' construction and interpretation of *Cummings v. Missouri*, 71 U. S. (4 Wall.) 277, and *United States v. Lovett*, 328 U. S. 303, demonstrate the invalidity of their argument that Washington's disclaimer oath requirement is a bill of attainder.

Employees admit that the oath in this case is prospective and cite no case in which this court has found a prospective act to be a bill of attainder. The acts struck down in the *Cummings* and *Lovett* cases and in *Ex parte Garland*, 71 U. S. (4 Wall.) 333, all involved punishment for past misdeeds. It is true that the punishment for past misdeeds was often conditioned on a future act, but in each case the individual punished could not have avoided the sanction. For example, as one writer has pointed out in 28 Rocky Mt. L. Rev. 258:

> "Garland and Cummings could not alter the fact that they had supported the confederacy in

the Civil War. Lovett, Dodd, and Watson could never again qualify as governmental employees whether they changed their loyalties or not."

At page 103 of Employees' Statement an out of context quote from Justice Frankfurter's concurring opinion in *United States v. Lovett, supra*, is used to support their argument that a bill of attainder need not also be *ex post facto* in order to be objectionable. A few more lines of quotation from that opinion demonstrate that the quote is not apposite. At page 323 of *U. S. v. Lovett*, Justice Frankfurter wrote:

> "Frequently a bill of attainder was thus doubly objectionable because of its ex post facto features. This is the historic explanation for uniting the two mischiefs in one clause—'No Bill of Attainder or ex post facto Law shall be passed.' No one claims that § 304 is an ex post facto law. If it is in substance a punishment for acts deemed 'subversive' (the statute, of course, makes no such charge) for which no punishment had previously been provided, it would clearly be ex post facto. Therefore, if § 304 is a bill of attainder it is also an ex post facto law. *But if it is not an ex post facto law, the reasons that establish that it is not are persuasive that it cannot be a bill of attainder. No offense is specified and no declaration of guilt is made.*" (Emphasis supplied.)

Whether that statement was applicable in the *Lovett* case or not, we submit that it is certainly applicable in the present case. In other words, the fact that the action in the present case is prospective is convincing evidence that the act was not an act of punishment but rather a regulatory act to control the future action of those coming under the act. A

member of a subversive organization cannot claim that he is penalized merely because the state requires him to resign from a subversive organization as a condition of his employment by the state. The requirement of non-membership is reasonably related to the end sought: trustworthy public employees.

Employees wholly ignore the Washington Supreme Court's interpretation of the 1955 Act and the constitutional prohibition against bills of attainder. In *Nostrand v. Balmer*, 53 Wn. (2d) 460, 335 P. (2d) 10 (1959); (which, in this respect, is this same case in an earlier journey to this Court through the state courts) our court said at p. 476:

> "Respondents complain that the statute which requires them to execute the oath in question is a bill of attainder and, as such, contravenes Art. I, § 23, of the state constitution and Art. I, § 10, of the United States constitution. Their argument is substantially the same as that rejected by this court in *Huntamer v. Coe*, 40 Wn. (2d) 767, 246 P. (2d) 489 (1952), wherein we held that section 16, as implemented by section 1(e) of the act of 1951 (requiring a similar oath as a condition precedent to filing a declaration of candidacy for any public office), was not unconstitutional for these reasons.
>
> "Section twelve of the 1951 act, as amended by Laws of 1955, chapter 377, § 1, requires only that every present or prospective public employee state, under oath, whether he or she is 'a member of the communist party or other subversive organization' at the time the oath is taken. No punishment for past conduct or political activity is involved. * * * *Garner v. Board of Public Works of Los Angeles*, 341 U. S. 716." (Footnotes omitted.)

The Washington Court followed the *Garner* case, *supra*, where this Court said on p. 720:

> "* * * The provisions operating thus *prospectively* were a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty to the State and the United States. Cf. *Gerende v. Board of Supervisors of Elections*, 341 U. S. 56, ante. Likewise, as a regulation of political activity of municipal employees, the amendment was reasonably designed to protect the integrity and competency of the service * * *; *and a State is not without power to do as much.*" (Emphasis supplied.)

The fact is that the oath requirement in the present case works less of a hardship on the person affected than the ordinance and charter amendment involved in the *Garner* case, *supra*; for here a member of a subversive organization may resign today and take the oath tomorrow. Justices Burton's and Frankfurter's objections to the *Garner* ordinance are not present here.

If the oath was an employment qualification in the *Garner* case, it is an employment qualification here.

In the *Douds* case, *supra*, the Court said on page 391 in upholding the "non-Communist" affidavit provision of the Taft-Hartley Act that voluntary affiliations and beliefs justify an inference concerning future conduct when drawn by the legislature on the basis of its investigations.

If the oath was valid as regulating future conduct in the *Douds* case, it is so in the present case.

Hence, even assuming, *arguendo*, that a bill of attainder could be prospective, the act in question is not a bill of attainder but is an employment qualification. This being true, it would be gratuitous comment for the court to comment on the possibility of "prospective bills of attainder." It would involve overruling, in part, several cases.

It is submitted that there is no merit to Employees' contention.

THERE HAS BEEN NO PRE-EMPTION OF THE 1955 ACT

The holding in *Pennsylvania v. Nelson*, 350 U. S. 497, so heavily relied upon by the Employees, has been reduced to its precise facts by *Uphaus v. Wyman*, 360 U. S. 72, 76-77 and *Sweezy v. New Hampshire*, 354 U. S. 234.

The portion of the state statute involved in the pre-emption argument in the *Sweezy* and *Uphaus* cases, *supra*, is the same as Washington's. The *Uphaus* case in 1959 is the last case to discuss "pre-emption." There the Court stated that the pre-emption contention "was denied *sub silentio*" in *Sweezy*, and thus, with these comparable statutes under consideration, the pre-emption argument appears foreclosed to Employees here as well. In *Uphaus*, at page 76, the court distinguished facts within the *Nelson* case from the case under consideration and stated:

> "* * * In *Nelson* itself we said that the 'precise holding of the court * * * is that the Smith Act * * * which prohibits the knowing advocacy of the overthrow of the

> Government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act which proscribed the *same conduct.*' (Italics supplied.) 350 US, at 499. The basis of Nelson thus rejects the notion that it stripped the States of the right to protect themselves. All the opinion proscribed was a race between federal and state prosecutors to the courthouse door. * * *"

The court proceeded, then, to enumerate areas which states could certainly legislate against. (For an excellent discussion of the *Nelson* and *Uphaus* cases and loyalty oath requirements in general see Professor Cramton's article in 43 Minn. L. Rev. 1025, 1959.) The irrelevancy of cases cited in Employees' Statement preparatory to the pre-emption argument may be seen from the following:

In *The Exchange*, 7 Cranch 116, the court balances federal authority with foreign authority and that case has no relevancy here.

In the *Legal Tender Cases*, 79 U. S. (12 Wall.) 457, the court held constitutional the power of Congress to prescribe bank notes as legal tender, and that debts created before and after such act can constitutionally be paid in such legal tender. This case is wholly irrelevant to the question here under consideration. Incidently, the quote on page 111 of the Statement is taken from a concurring opinion.

THE 1955 ACT DOES NOT REQUIRE SELF-INCRIMINATION

Employees' contention, that the 1955 statute is void as requiring plaintiffs to incriminate themselves with respect to their own disloyalty, is strained, without merit and should be rejected.

The state high court interpreted this statute in relation to the Fifth Amendment privilege against self-incrimination in *Nostrand v. Balmer*, 53 Wn. (2d) 460, 477, 335 P. (2d) 10, and found no merit in a similar contention. There the court stated:

> "Nor do we find merit in respondents' assertion that section twelve, as amended, violates * * * that clause of the Fifth Amendment to the United States Constitution which provides that no person 'shall be compelled in any criminal case to be a witness against himself.' Respondents are not compelled by section twelve to do anything. But, if they desire to remain in public employment, they must comply with the standards of eligibility established by the legislature, * * *."

Failure to sign the oath does not result in an inference of guilt concerning subversive activity or Communist Party membership. *Nostrand v. Balmer*, *supra*. Any possible prosecution for those crimes or for Employees' claimed anticipation of perjury would have to be affirmatively proved as elements of those crimes. The disclaimer oath would there be relevant only as the means which plaintiffs used to commit perjury.

Since Employees are not being required to give testimony against themselves, *Nostrand v. Balmer*,

supra, but are merely required, pursuant to the 1955 Act, to disclaim their knowing participation in subversive organizations, the statute does not impinge upon the Fifth Amendment privilege against self-incrimination. *Communist Party v. S.A.C. Board*, 367 U. S. 1; *Konigsberg v. State Bar of California*, 366 U. S. 36; *In re Anastaplo*, 366 U. S. 82; *Lerner v. Casey*, 357 U. S. 468; *Cohen v. Hurley*, 366 U. S. 117; *Beilan v. Board of Education*, 357 U. S. 399; *Gerende v. Election Board*, 341 U. S. 56.

The holding of the three-judge district court should be upheld. That court stated at pp. 19-20, Appendix, Statement:

> "A further argument made against the validity of the loyalty oath statute is that it infringes upon the privilege against self-incrimination. There is no merit in this argument. The statutory requirement that government employees must answer relevant questions by written statement if they wish to establish their eligibility for employment does not require plaintiffs to give testimony against themselves. *The absence of any inquiry into past conduct and the implied inclusion of the element of scienter negate the potential danger of self-incrimination.* The statements in *Cramp, supra*, on which plaintiffs rely, were made in reference to an oath in language found to be unconstitutionally vague and are not applicable here." (Emphasis supplied.)

Finally, there is a short but conclusive argument which must be mentioned:

> "It is settled law that the clause of the Fifth Amendment, protecting a person against being compelled to be a witness against himself,

is not made effective by the Fourteenth Amendment as a protection against state action. * * *" *Adamson v. California*, 332 U. S. 46, 50; also *Twining v. New Jersey*, 211 U. S. 78, 91-98.

THE DISTRICT COURT WAS CORRECT IN DISMISSING EMPLOYEES' COMPLAINT WITH PREJUDICE

Following an extended discussion of the doctrine of equitable abstention in the Federal Courts, the Employees on p. 116 of their statement assign error to the dismissal of their complaint.

As we set forth in part VII of this motion, the three-judge court properly refused to adjudicate questions involving the 1931 Act. In any event, the dismissal with prejudice only precludes the Employees from bringing another action in the federal court until after the state court has authoritatively construed that act. *Martin v. Creasy*, 360 U. S. 219 (1959); *United Gas Pipeline Company v. Ideal Cement Company*, 369 U. S. 134 (1962); *Cf.* annotation, Remission of issues to state courts, 3 L.ed. 2d 1827; (compare a similar order by this court in *Nostrand v. Little*, 362 U. S. 474 (1960) and 368 U. S. 436 (1962)).

The district courts order of dismissal following the memorandum opinion was not based upon equitable abstention as to the remainder of the case. The court clearly and extensively considered all of the Employee's contentions. The lower court upheld the constitutionality of the 1955 Act and the dismissal

was the proper order with which to terminate the litigation. The Employee's contention is without merit.

THE DISTRICT COURT WAS CORRECT IN DISMISSING THE STUDENTS

Allowing the Students to challenge the constitutionality of the statutes involved here would do violence to a longstanding judicial principle. This Court observed in *United States v. Johnson*, 319 U. S. 302, 305, that it would refuse to decide any dispute which "does not assume the 'honest and actual antagonistic assertion of rights' to be adjudicated—a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensable to adjudication of constitutional questions by this Court."

Accordingly, in *Poe v. Ullman*, 367 U. S. 497, this Court refused to pass upon the constitutionality of a state statute where the moving party was unable to show he was threatened with its immediate enforcement.

The general principle from these cases is applicable here since the statutes challenged in this case have no direct application to students, have never been enforced against students and were not intended to affect students. The Students cannot show even an indirect injury, for the required loyalty oaths impose no restriction on what an instructor may teach in the classroom.

Part VI

THERE IS NO ACTUAL CONTROVERSY IN THIS DECLARATORY JUDGMENT PROCEEDING ATTACKING AN AMENDATORY ACT

No actual or real controversy is presented to this Court. This is especially clear with regard to the Fourteenth Amendment argument, since there has been no actual refusal, as pointed out earlier. The resemblance between the "controversy" in this case and the "controversy" in *United Public Workers v. Mitchell*, 330 U. S. 75, also a declaratory judgment proceeding, is striking. In *Mitchell* a large number of appellants were attacking a portion of the Hatch Act (54 Stat. 767, 5 U.S.C. § 118j *et seq.*) forbidding active political management. The appellants in that case filed a large number of affidavits in which they set forth their desire to engage in political activities. The Court selected as an example one of these affidavits and reproduced it in footnote 18 on page 75. The resemblance between the statements of intention set forth in the affidavit in *Mitchell* and the statements of the Employees in the Pre-Trial Order is striking.

Only one of the appellants in the *Mitchell* case, George P. Poole, had, in fact, violated the provisions of the Hatch Act. The Court held on page 91 that the individual appellants, other than Poole, could not maintain the action. The present case is similar except that in the present case there is no employee

like Mr. Poole who has actually violated the 1955 oath requirement.

At times advisory opinions are useful. But "As is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions." *United Public Workers v. Mitchell*, 330 U. S. 75, 89.

Nor can the Employees get into the substantial question arena by the back door, so to speak, by utilizing the declaratory judgment procedure. In *Alabama Federation of Labor v. McAdory*, 325 U. S. 450, on page 461 this Court held that "The requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit." After noting that a law which is constitutional as applied in one manner may violate the Constitution when applied in another the Court added on page 462:

> "* * * But 'Since all contingencies of attempted enforcement cannot be envisioned in advance of those applications' this Court has felt bound to delay passing on 'the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured.' *Watson v. Buck*, 313 U. S. 387, 402. All these considerations forbid our deciding here the constitutionality of a state statute of doubtful construction in advance of its application and construction by the state courts and without reference to some precise set of facts to which it is to be applied. The declaratory judgment procedure may be resorted to only in the sound

> discretion of the Court and where the interests of justice will be advanced and adequate and effective judgment may be rendered. * * *"

It should be added that the statute before the Court in the *McAdory* case was similar to the 1951 Act as amended by the 1955 Act in the present case in that both statutes are comprehensive and abound with questions which can be answered authoritatively only by the state high court. In fact, the Act in the present case seems to present more questions for interpretation than the statute involved in *Adler v. Board of Education*, 342 U. S. 485, which so troubled Mr. Justice Frankfurter. In addition, this case differs factually from *Adler* in that in *Adler* no oath form was proffered to the teachers. Hence, there was no problem of lack of a "refusal" which problem exists in the present case. A delay by the Court in *Adler* would not necessarily have caused that case to become more ripe for decision. Whereas, in the present case, an action brought after an actual refusal would settle many questions such as the right to a hearing.

Far from presenting a substantial federal question the real fact is that this case does not present a substantial controversy. An examination of the briefs in this case and of the briefs and decisions in the *Nostrand* cases, shows that there has already been too much litigation involving too little actual controversy.

Part VII

THE 1931 OATH OF ALLEGIANCE STATUTE

The 1931 oath of allegiance statute, chapter 103, Laws of 1931 (RCW 28.70.150 and RCW 28.76-.230), requires the professors and other teaching employees at Washington's state universities to subscribe to an oath which reads as follows:

> "I, the undersigned, do solemnly swear (or affirm):
>
> "(1) That I will support the constitution and laws of the United States of America and of the State of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, for reverance for law and order, and undivided allegiance to the government of the United States. * * *"

This statute has never been construed by the Washington Supreme Court. We adhere to the position urged below, adopted by the three-judge district court, and constantly reiterated by this court, namely "Wise judicial administration counsels that decision of the federal question be deferred until the potentially controlling state law issue is authoritatively put to rest." *United Gas Pipeline Company v. Ideal Cement Company*, 369 U. S. 134 (1962) and cases cited therein.

By drawing attention to certain parts of the pre-trial order, Employees, on page 121 and 122 of their Statement have given the impression that aliens are forced to take the oath required by the

1931 Act. This is not, in fact true. With the thousands of faculty members, it is possible that, by mistake, the signing of the 1931 oath may have been requested of an alien; but this is not the practice of the University of Washington and has not been the practice for many years.

The pre-trial order must be read as a whole. Thus the statement of President Odegaard on page 91 of the pre-trial order, and the paragraph on page 78 of the pre-trial order must be read along with page 77 where aliens are treated specifically. It reads, "For many years, the past practice at the University of Washington with regard to teaching faculty who are aliens, and *at all times material to this cause*, has been *similar* to that suggested by the memorandum circulated through the department of Mathematics and reproduced below." (Emphasis supplied.) The memorandum referred to points out that, "The last clause of the first sentence which reads 'and undivided allegiance to the government of the United States' may be replaced by the phrase 'insofar as it is compatible with my citizenship in .....'" Who can say what other oath form would be "similar"? Yet, on page 119 of their Statement, Employees actually state, "* * * the record is clear that an oath, perhaps a modified 1931 oath, has always been required of all alien-professors. * * *" This Court cannot pass on a "modified" oath, which is "similar" to the one set forth in the above memorandum. One thing is certain. The very word "modified" means that it is *not* the 1931 oath.

Employees allege that this oath is arbitrary and hence void under the due process clause in that it requires aliens to take an oath of undivided allegiance to the United States, thereby placing them in the inconsistent position of averring undivided allegiance to one government while retaining the citizenship of their native country. The answer is that aliens at the University of Washington are not, and for some years past have not been, required to subscribe to the oath of allegiance in the form required by the 1931 law.

It is at least arguable that the legislature intended the words, "every person applying for a license to teach * * *" to cover not "every person" in the broadest sense but every person who should owe allegiance to this country. It is to be noted that legislation was enacted prohibiting aliens from teaching *in the common schools* (chapter 38, Laws of 1919, RCW 28.67.010, *et seq.*) Three decades later, chapter 32, Laws of 1949 (RCW 28-.67.020, part) amended Section 1 of the 1919 act to allow exchange teachers *in the public schools* "irrespective of requirements respecting citizenship and oath of allegiance." Neither statute referred to institutions of higher education. This demonstrates that the Washington Legislature in 1949 assumed that the 1931 act did not apply to institutions of higher education. But, of course, whether the long-standing interpretation of the 1931 act by the administrative agencies—even though it is entitled to

great weight—is the correct interpretation, is a question for the state courts.

On the merits, Employees have little or no authority to support their claim that the 1931 Act is invalid. In fact, *Re Summers*, 325 U. S. 561, supports its validity. There, this Court held that the refusal of a bar applicant to take an oath to support the state constitution is a ground for denying admission to the bar and is not a denial of due process under the Fourteenth Amendment. The state constitution had a provision requiring service in the militia in time of war. In that case the applicant refused because of his unwillingness based on personal scruples to serve in the state militia in time of war.

If a state can refuse to allow a person to practice law on this ground, surely a state can demand of a teacher, as a condition of employment, an oath of undivided allegiance.

The Employees, in the court below, raised several issues in regard to alleged vagueness of the language of the prescribed oath of allegiance. The three-judge district court on page 28, Statement, Appendix, replied as follows:

> "These contentions of vagueness of the oath of allegiance statute raise substantial constitutional issues, bringing into question as they do the meaning and intended scope of the statute. Although statutory construction may resolve these questions in such a way as to remove doubts concerning constitutionality, it appears that the Supreme Court of Washington has never had occasion to construe the oath of alle-

giance provisions of Chapter 103, Laws of 1931, although declaratory judgment proceedings are available in the Washington courts. Authoritative interpretation of the statute by the Washington court may avoid the constitutional issue, or show it in clearer perspective, or resolve it."

Thus, for three compelling reasons, an attack on the oath of allegiance statute by the employees must fail. First, one may not challenge the validity of a statute which does not affect him. *Alabama Power Co. v. Ickes*, 302 U. S. 464; *Massachusetts v. Mellon*, 262 U. S. 447, 488. Second, one may not challenge the constitutional validity of a statute which has never been enforced. *Poe v. Ullman*, 367 U. S. 497 (statute prohibited sale of contraceptives). Third, one may not challenge the constitutional validity of a state statute before doubtful questions concerning the application of state law have been resolved by the state courts. *Leiter Minerals, Inc. v. United States*, 352 U. S. 220, 228-229; *United Gas Pipeline Co. v. Ideal Cement Co.*, 369 U. S. 134, *supra*. Again, the 1931 oath of allegiance statute has never been construed by a Washington court. The latter point regarding state law presents a barrier to non-alien as well as alien Employees.

There is no reason to suppose that the Washington courts will not accord full constitutional protection to the employees. The two *Nostrand* cases are examples of the length to which our state court will go to protect constitutional rights under the statutes here in question.

The words of this court in *Martin v. Creasy*, 360 U. S. 219 (1959) are here particularly applicable. At page 225 the Court said:

> "There is no reason to suppose that the Commonwealth of Pennsylvania will not accord full constitutional scope to the statutory phrase 'actual taking of property.' If, after all is said and done in the Pennsylvania courts, any of the plaintiffs believe that the Commonwealth has deprived them of their property without due process of law, this Court will be here." (Footnote omitted.)

CONCLUSION

During the past decade and a half, this Court has decided several cases which provide relatively accurate guidelines as to whether an oath violates a constitutional guarantee. Thus, a state cannot require an oath which does not contain the element of scienter; neither can it require an oath which is unconstitutionally vague. A state cannot carry out an unconstitutional abridgement of free speech in the guise of combating subversion. And a state cannot shift the burden of proof of disloyalty, where a large hetrogeneous group is involved, such as veterans, by an oath requirement.

This Court has upheld the validity of several oaths which, like the disclaimer oath in this case, do not contravene these guarantees.

Apart from precedent, this is a declaratory judgment proceeding attacking an amendatory act and lacking an actual controversy.

For these reasons, this Court should dismiss this appeal for want of a substantial federal question as to the 1955 Act, or in the alternative, affirm the lower court.

The 1931 Act has never been before any state court of any kind. For this reason alone, this Court should dismiss the appeal for want of a substantial federal question as to the 1931 Act, or in the alternative, affirm the lower court.

Respectfully submitted,

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